

Testimony on behalf of organizations listed below

Prepared for the House Committee on Natural Resources

Subcommittee on Water, Wildlife and Fisheries

Regarding the “Restoring Effective Science-based Conservation Under Environmental laws protecting Whales Act of 2023” or the “RESCUE Whales Act of 2023”
and implications for the North Atlantic right whale.

Tuesday, April 18, 2023

Thank you, Chair Bentz, Ranking Member Huffman, and members of the Subcommittee for this opportunity to submit testimony about the critically endangered North Atlantic right whale (“right whale”) and the value of our bedrock wildlife protection laws, the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Because fewer than 340 right whales remain alive and because their numbers are in sharp decline, the undersigned coalition of national and regional groups focused on protecting right whales supports swift passage of Rep. Grijalva’s Restoring Effective Science-based Conservation Under Environmental Laws Protecting (RESCUE) Whales Act.¹

Additionally, we seek to ensure that the MMPA and ESA are not continuously chipped away but are robustly implemented based on the best available science to ensure the survival and recovery of imperiled species and marine mammals. These laws, which have stood the test of time over five decades, represent our nation’s commitment to protect its rich heritage of biodiversity. We must guarantee that the above essential environmental laws continue to prevent federal actions from impacting endangered species, and that robust consultations are carried out to tackle risks from human-caused threats.²

The RESCUE Whales Act would revoke section 101(a) of the last-minute addition (the “Right Whale Rider”), added to FY 2023 omnibus funding package. Section 101(a) deemed the September 2021 regulation amending the Atlantic Large Whale Take Reduction Plan under the MMPA sufficient to ensure that continuing state and federal authorizations of the American lobster and Jonah crab fishery are fully compliant with the MMPA and ESA through December 31, 2028.³

The Right Whale Rider overrode a court decision ordering NMFS to complete a new rulemaking by December 2024 to correct its serious legal errors in failing to follow its own science on the reductions in lethal entanglements necessary to allow the right whale to recover. Congress should neither legislate to overrule specific court decisions nor interfere with NMFS’s mandatory duty to follow both the science and the law in protecting the right whale.

¹ H.R. 1213 — 118th Congress (2023-2024): RESCUE Whales Act of 2023 (February 27, 2023).

² *Id.*

³ Title I, “North Atlantic Right Whales and Regulations,” Pub. L. No. 117-328, Div. JJ, 136 Stat. 4459, 6089–90 (2022).

Species Status and Background: Right Whale Rider Spells Disaster for Right Whales

The North Atlantic right whale is one of the most endangered large whale species in the world. It has been listed under the ESA since 1970 and protected by the MMPA since 1972.⁴ The most recent population estimate shows a continued decline, with approximately 340 whales remaining, including only about 70 breeding females.⁵ NMFS has determined that, for the species to recover, only 0.7 right whales per year (or seven right whales every decade) can be killed due to human causes.⁶

Entanglement in fishing gear is one of the two known major causes of adult right whale mortality. Moreover, non-lethal entanglements also cause serious health impacts, including by lowering reproduction rates.⁷ Entanglements are a frequent occurrence in the population. A recent study found that about 86% of right whales have been entangled at least once and some showed evidence of as many as eight entanglements during their lifetime.⁸ In 2017, NMFS declared an Unusual Mortality Event (UME) – an event involving a significant die-off of the population that demands immediate response – that is still ongoing. In this time, entanglements have been the documented cause of 9 mortalities, 30 serious (i.e., likely lethal) injuries, and 21 sublethal injuries or illnesses.⁹ Additionally, the true impact of entanglements on right whales is much higher, as scientists estimate that observed deaths only represent one-third of total right whale deaths and that entanglements are likely responsible for two-thirds of unobserved, or cryptic, mortalities.¹⁰

The right whale is protected by both the ESA and MMPA. In 1973, Congress enacted the ESA “to provide a program for the conservation” of endangered species.¹¹ “Conservation” is defined by statute to mean “the use of all methods and procedures which are necessary to bring any endangered species...to the point at which the measures provided by this chapter are no longer necessary.”¹² Under the ESA, NMFS has a mandate to ensure that any action it authorizes, funds, or carries out does not jeopardize the survival and

⁴ 50 C.F.R. § 224.101

⁵ New England Aquarium. (2022). North Atlantic right whales’ downward trend continues as updates population numbers released.

<https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/>; Reed, J., New, L., Corkeron, P., and Harcourt, R. (2022).

Multi-event modeling of true reproductive status of individual female right whales provides new insights into their decline. *Marine Science* 9. doi: 10.3389/fmars.2022.994481

⁶ NOAA Fisheries. (2022). Draft North Atlantic Right Whale (*Eubalaena glacialis*): Western Atlantic Stock, at 17 <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>.

⁷ Knowlton, A.R., Clark, J.S., Hamilton, P.K., Kruas, S.D., Pettis, H.M., Rolland, R.M., and Schick, R.S. (2022). Fishing gear entanglement threatens recovery of critically endangered North Atlantic right whales. *Conservation Science and Practice* 4(8). doi:10.1111/csp2.12736

⁸ Moore MJ, Rowles TK, Fauquier DA, Baker JD and others. (2021). REVIEW Assessing North Atlantic right whale health: threats, and development of tools critical for conservation of the species. *Dis Aquat Org* 143:205-226. <https://doi.org/10.3354/dao03578>

⁹ 2017-2023 North Atlantic Right Whale Unusual Mortality Event (n.d.) NOAA Fisheries.

<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>

¹⁰ Pace R.M, Williams, R., Kraus, S.D., Knowlton, A.R., and Pettis, H.M. (2021). Cryptic mortality of North Atlantic right whales. *Conservation Science and Practice* 3(2). doi: 10.1111/csp2.346

¹¹ 16 U.S.C. § 1531(b).

¹² *Id.* § 1532(19).

recovery of the right whale.¹³ Enacted in 1972, the MMPA’s “major objective” is to stop marine mammal populations from declining and ensure that they remain a functioning part of their marine ecosystems.¹⁴ For both statutes, NMFS is the lead agency tasked with protecting most marine mammals, including right whales.⁴ Under these mandates, NMFS has the authority and obligation to protect endangered marine mammals from injury, death, and potentially extinction in this case.

Added to the FY 2023 omnibus mere days before the legislation was finalized, the Right Whale Rider essentially sidestepped the MMPA and ESA, a district court order in ongoing litigation, and the normal legislative process. This addition pushed back the deadline for NMFS to issue new regulations on reducing lethal entanglement risk in the American lobster and Jonah crab fishery until December 31, 2028. As it stands, this Right Whale Rider has two primary impacts on federal regulations and funding related to right whale conservation.

First, the Right Whale Rider deemed a NMFS 2021 rule amending the regulations implementing the Atlantic Large Whale Take Reduction Plan (“the 2021 Rule”) sufficient to ensure that continuing federal and state authorizations of the American lobster and Jonah crab fishery are in full compliance with the MMPA and ESA through December 31, 2028. The rider requires that NMFS implement new regulations by that date, “utilizing existing and innovative gear technologies, as appropriate.”¹⁵ Just the month before, the United States District Court for the District of Columbia held that NMFS must issue a new rule by December 9, 2024.¹⁶ In effect, the Right Whale Rider pushed back this court-ordered deadline by four years. Revised regulations are absolutely essential to preventing the continued decline of the right whale from lethal entanglements in the American lobster and Jonah crab fishery, as the MMPA expressly requires.

Second, between now and the end of 2028, NMFS is also required by the Right Whale Rider to submit annual reports to Congress on: the status of right whale, the necessary actions and plans to implement regulations to reduce right whale deaths by 2028, serious injury and mortalities caused per fishery and country, and the number of American lobster and Jonah crab fishers that have transitioned to new, innovative gear technologies. As part of these reports, the legislative language specifies that NMFS must report on “the actions taken and plans to implement measures expected to not exceed Potential Biological Removal by December 31, 2028.”¹⁷ This language implicitly acknowledges that the 2021 Rule alone will not adequately reduce the rate of human-caused mortality and serious injury of right whales.

RESCUE Whales Act: Common Sense Solutions Rather than Extreme Carve-outs Needed

Rep. Grijalva’s RESCUE Whales Act would repeal the Right Whale Rider and return to the prior status quo, requiring NMFS to comply with the court order requiring it to issue new regulations by December 9, 2024, to adhere with the MMPA and paving the way for right whales to avoid extinction. Combined with significant funding appropriations in FY 2023 and authorized over the next years, the grant funding from

¹³ 16 U.S.C. § 1536(a)(2).

¹⁴ *Id.* § 1361(6).

¹⁵ Consolidated Appropriations Act, 2023 at § 101(a)(2).

¹⁶ *Center for Biological Diversity v. Raimondo*, Civil Action No. 18-112 (D.D.C.), ECF No. 239.

¹⁷ Consolidated Appropriations Act, 2023 at § 101(a)(3).

the FY 2023 omnibus toward innovative gear, including on-demand fishing gear, Rep. Grijalva's RESCUE Whales Act would give this species a fighting chance against its primary threats from entanglement in fishing gear and vessel collisions. We recommend that innovative gear technologies mentioned in the new grant program be prioritized towards the buildout and ramping up of on-demand fishing technologies, including the tracking technologies needed to avoid gear conflicts and the regulations necessary to govern the use and enforcement of on-demand fishing. The swift development of on-demand gear to be deployed where right whales co-occur with dense aggregations of heavy, dangerous lobster gear and other new technologies will be vital to reducing impacts to right whales and enabling coexistence with the American lobster and Jonah crab fishery.

The FY 2023 omnibus set aside significant funding for gear innovations and mitigating fishing entanglement and vessel strikes for right whales. However, the eleventh hour deal made to include this Right Whale Rider may push this species to the point of no return. As one million species face extinction, we should be helping species like the right whale recover and creating a more abundant, resilient world for future generations, not gutting the very laws set in place to provide desperately needed protections for these imperiled animals.¹⁸ We cannot allow extreme reactions to congressional politics dictate the future of the right whale and set dangerous precedent for other species along the way.

While we will not solve these complex marine mammal and fisheries management issues overnight, we must continue working together. Unfortunately, the Right Whale Rider does the opposite by undermining decades of science. Right whales cannot afford to lose this time; each year we deny science-based protections to the species, it creeps closer to extinction. Our groups thank Rep. Grijalva and the original co-sponsors of the RESCUE Whales Act for their support of conservation policies that are forward-looking and science-based, balancing the needs of endangered species and ocean stakeholders.

Thank you for the opportunity to submit the above testimony,

Animal Welfare Institute
Center for Biological Diversity
Cetacean Society International
Defenders of Wildlife
Earthjustice
Endangered Habitats League
Endangered Species Coalition
Environment America
Environmental Investigation Agency
Friends of the Earth
GREAT Old Broad for Wilderness
Tucson Howling For Wolves
IFAW
International Marine Mammal Project of Earth Island Institute
Natural Resources Defense Council

¹⁸ IPBES. (2019). Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (Version 1). Zenodo.doi: 10.5281/zenodo.3831673

Oceana
Ocean Defense Initiative
Pacific Whale Foundation
Predator Defense Public
Employees for Environmental Responsibility, Inc.
Resource Renewal Institute
Rocky Mountain Wild
Sierra Club
Southern Environmental Law Center
The International Wildlife Coexistence Network
The Urban Wildlands Group
Turtle Island Restoration Network
Voices of Wildlife in NH
Whale and Dolphin Conservation
Wolf Conservation Center
World Wildlife Fund